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LaDonna Castañuela, Chief Clerk Mail Code 105
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, TX 78711-3087

RE: ENCORE WIRE CORPORATION, TCEQ DOCKET NO. 2010-1585-MIS-U

Dear Ms. Castañuela:

Enclosed for filing is Encore Wire Corporation's reply to the Office of Public Interest Counsel's response brief to our appeal of the Executive Director's Use Determination in the above referenced matter.

Sincerely,

CANTRELL McCULLOCH, INC.

A handwritten signature in blue ink, appearing to read 'D. Milan'.

DAVID M. MILAN

Enclosure

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) prepared and filed a response to Encore Wire Corporations Appeal of the Executive Director's (ED) Use Determination based on our Application No. 14259 referenced matter TCEQ Docket No. 2010-1585-MIS-U. Below is our reply to the reasoning and issues submitted in Counsel's response to our Appeal that resulted in the negative determination. I am addressing each issue by page number from Counsel's response.

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OPIC, Section II: Description of Applicable Law "30 TAC Chapter 17".

ENCORE RESPONSE: Rule §17.4 (a) states, "To obtain a positive use determination, the pollution control property must be used, constructed, acquired, or installed wholly or partly to meet or exceed laws, rules, or regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas, for the prevention, monitoring, control, or reduction of air, water, or land pollution. In addition, pollution control property must meet the following conditions.

- (1) Property must have been constructed, acquired, or installed after January 1, 1994.
(Property acquired and installed in February and March, 2009 which meets the condition of §17.4 (a) (1))
- (2) Land must include only the portion of the land acquired after January 1, 1994, that actually contains pollution control property.
(This condition is not applicable, pollution control property is equipment)
- (3) Equipment, structures, buildings, or devices must not have been taxable by any taxing unit in Texas on or before January 1, 1994, except that if construction of pollution control property was in progress on January 1, 1994, that portion of the property constructed, acquired, or installed after January 1, 1994, is eligible for a positive use determination.
(Property acquired new and installed in February and March, 2009 which meets the condition of §17.4 (a) (3))
- (4) Property purchased from another owner is eligible for a positive use determination if it is acquired, constructed, or installed by the new owner after January 1, 1994, will be used as pollution control property, and was not taxable by any taxing unit in which the property is located on or before that date.
(Property acquired new and installed in February and March, 2009 which meets the condition of §17.4 (a) (4))

(b) The executive director shall determine the portion of the pollution control property eligible for a positive use determination.

(Property is listed in Part A of the Equipment and Categories List (ECL), under the "Miscellaneous Pollution Control Equipment" No. M-4. In the description of Part A of the ECL, it states "The use percentages on Part A of the ECL are established based on standard uses of the pieces of equipment involved." The subject pollution control property is used in a standard manner for the purpose intended. The use percentage is listed as 100%. Based upon the full

description, as long as the property is being used in a consistent manner, the Executive Director has predetermined that the use determination percentage, therefore the equipment meets the requirement of §17.4 (b))

(c) The executive director may not make a determination that property is pollution control property unless all requirements of this section and the applicable requirements of §17.15 and §17.17 of this title (relating to Review Standards and Partial Determination) have been met.

(Sec §17.15 (a), following from Box 3 answer is yes, the primary rules relating to the subject property is 30 TAC §335 Subchapter Q requires facilities such as Encore to develop and implement a pollution prevention plan in accordance with the Waste Reduction Policy Act of 1991. This clearly support the purpose and use of the pollution equipment at issue; Box 5 answer is yes, to reduce potential discharge of TRI chemicals and hazardous waste into storm water; Box 6 answer is no; Box 8 answer is yes, reduces potential contamination of storm water by virtue of controlled storage environment for baled material; Box 9 answer is yes , M-4 under Miscellaneous Pollution Control Equipment; Box 12, property qualifies for Tier I Application. §17.15 (b) Decision Flow Chart is not applicable, relates to PART B ECL and §17.17 relates to partial determination procedures)

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OPIC Response: "The ED determines the portion of the pollution control property eligible for a positive use determination. 30 TAC 17.4(b)".

ENCORE RESPONSE: For the equipment listed in PART A of the Equipment and Categories List, the executive director has already made a determination that the listed equipment is used either wholly or partly for pollution control purposes (30 TAC 17.14(a)). The applicant must only demonstrate that the equipment is used in a "standard manner" (reference paragraph at top of PART A list). Encore has demonstrated that the balers are being used in a standard manner, i.e., the balers are used for the intended purpose as identified in the PART A excerpt below. The ED "predetermined" that balers are eligible for 100% positive use determination.

M-4	Land	Compactors, Barrel Crushers, Balers, Shredders	Compactors and similar equipment used to change the physical format of waste material for recycling/reuse purposes or on-site disposal of facility-generated waste.	100
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OPIC Response: "Section 17.15(a) and (b) provide Decision Flow Charts for making use determination. There are two Decision Flow Charts, one for non-Tier IV applications and one for those applications with just items from Part B of the ECL (or Tier IV applications). 30 TAC 17.15(a) and (b)."

ENCORE RESPONSE: The fact that the flow chart "ends" once it is determined that the equipment is PART A-eligible is an argument in itself that PART A equipment has been predetermined to be eligible if the applicant can demonstrate that it is used for the "standard" purpose as outlined in the response above.

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OPIC Response: "Section 17.10 addresses the application requirements for use determination. In particular, all use determination applications must contain, in addition to other information, "the specific law, rules, or

regulations that are being met or exceeded by the use, installation, construction, or acquisition of the pollution control property. 30 TAC 17.10(d)(4)."

and

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OPIC Response: "As to the merits of the appeal, the rules and regulations cited by Applicant do not require installation of the balers."

ENCORE RESPONSE: The Executive Director, in listing equipment in the Category A list, has already made a determination that the equipment is "used wholly or partly for pollution control purposes." The TCEQ's Chapter 17 rule (and the language at the top of the PART A list) does not require that PART A equipment be specifically listed in an environmental regulation, that a specific target reduction be met, or that the pollution control activity be "enforceable". Encore has provided several rules that are being met by using the balers (below).

Pollution Control Act of 1990 and EPCRA -

from EPA's website...."The Pollution Prevention Act established the national policy that pollution should be prevented or reduced at the source whenever feasible. Preventing pollution offers important economic benefits, as pollution never created avoids the need for expensive investments in waste management or cleanup."...."Pollution Prevention Act (PPA) §13106 - Owners and operators of businesses that are required to file a toxic chemical release form must include a toxic reduction and recycling report". Encore is compelled under EPA rules to implement pollution reduction practices at the site.

TCEQ Waste Reduction Policy Act (Chapter 335 Subchapter Q): This rule requires that Encore implement pollution reduction practices for reportable TRI chemicals and hazardous wastes. The balers recycle plastic which contains reportable TRI chemicals.

TCEQ Multi-sector Storm Water Permit (TXR050000) - This permit requires that Encore develop "Best Management Practices (BMPs) to reduce the discharge and potential discharge of pollutants in storm water." Using the balers indoors diverts waste streams (e.g., cardboard, PVC) from outdoor handling and storage and the potential for storm water contamination. The federal and storm water rules for industry do not specifically list equipment or practices that must be used to prevent/reduce storm water contamination. Balers are a commonly used BMP for reduction of outdoor exposure of waste.

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OPIC Response: "OPIC concludes the standard advocated by the Applicant expands the tax exemption too broadly...The tax exemption is designed to ameliorate the cost of pollution control property specifically required by rules and regulations or otherwise installed to meet an enforceable emission or discharge limit, not to provide an incentive to purchase and install the property."

ENCORE RESPONSE: The standard the balers must meet pursuant to Chapter 17 does not include, as previously mentioned, the requirement that the applicable environmental regulation specifically list the equipment, or that the equipment meet an enforceable emission or discharge limit. Encore maintains that the absence of a "limit" does not detract from the pollution control benefit of a piece of equipment.

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OPIC Response: "Similar to the pollution prevention plan, BMPs do not set enforceable emission and discharge limits and do not require specific pollution control equipment. However, unlike the recordkeeping and planning requirements, which do not require pollution control, BMPs require pollution measures. Ultimately, OPIC concludes BMPs are too open-ended and thus an insufficient basis to qualify for the tax exemption"

ENCORE RESPONSE: Other equipment that is listed in the ECL, specifically S-26, the description specifically mentions that the piece of equipment is put in place as part of a facility's permanent Best Management Plan (BMP). If a BMP is so broad for an industry standard piece of equipment that is use throughout industry to divert generated materials from solid waste streams, control potential contamination hazards and promote recycling how could it not qualify as pollution control equipment. A review of the ED's PART A equipment reveals that the majority of the listed equipment will not be specifically listed or referenced in a rule, thus negating the use of the bulk of this equipment if the OPIC's opinion is upheld.

Encore respectfully requests that the Negative Use Determination be overturned and remanded back to the Executive Director for issuance of a Positive Use Determination.

Respectfully submitted,

CANTRELL MCCULLOCH, INC.



David M. Milan